United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

ORIGINAL

74-1823

United States Court of Appeals
FOR THE SECOND CIRCUIT

VERMONT FOOD INDUSTRIES, INC.,

Plaintiff-Appellee,

against

RALSTON PURINA COMPANY,

Defendant-Appellant.

ON APPEAL FROM AN ORDER AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT

Civil Action No. 6753

REPLY BRIEF OF DEFENDANT-APPELLANT RALSTON PURINA COMPANY

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Plaintiff's brief makes a hodgepodge of the facts. By jumbling the contentions and evidence as to the flocks and the feed, plaintiff seeks to avoid or obscure the issues of law. Reversible error was committed below. The fact that defendant was adjudged liable on only one of four theories or that the award was slightly short of the precise dollar amount sought, does not establish the propriety of the result, which is demonstrably wrong.

I.

As to the four phantom flocks, there was no basis for liability.

Reversible error was committed by the court below in its ruling with respect to the phantom flocks (flocks A-1, A-2, B-1 and C-1)—the four flocks that had passed quietly out of existence long before August 1972, when plaintiff first discovered that it had fat chickens in the Vermont complex.*

Plaintiff's entire case was premised on the fact that its chickens had Fatty Liver Syndrome or got too fat from defendant's feed, and therefore laid fewer eggs than they otherwise might have. But there was no proof that any chickens in the four phantom flocks had Fatty Liver Syndrome or were at all fat. The graphic descriptions of obesity in plaintiff's hens were strictly limited to flocks B-2, C-2 and Dostie (Plaintiff's Brief, pp. 4, 6**). These were the only flocks still in existence when the problem was discovered, and the only flocks examined by Dr. Hoffman and the other experts at that time. Any inferences drawn from the findings must be restricted to those flocks.

Liability as to the earlier flocks, which accounted for damages of $162,820.12, rested entirely on Dr. Hoffman's answer to a hypothetical question. No other basis was present in the evidence; no other basis for liability as to these flocks is suggested in plaintiff's brief (Plaintiff's Brief, pp. 28-31). Dr. Hoffman had never seen flocks A-1 A-2, B-1 or C-1.

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* Plaintiff's brief erroneously includes A-2 as one of the flocks which was examined by Dr. Hoffman in August 1972 (Plaintiff's Brief, pp. 8, 20). Of the flocks in issue, the only birds in the Vermont complex in August 1972 were Flocks B-2 and C-2; these two flocks were the only birds examined by Dr. Hoffman. Flock A-2 terminated in May 1972 (E1), three months before Dr. Hoffman even appeared on the scene.

** The page references herein refer to plaintiff's typewritten brief, since plaintiff's counsel has informed us he is not filing a printed brief.

The critical hypothetical question answered by Dr. Hoffman was not supported by facts in evidence. The court below committed reversible error by refusing to strike this question, by failing to separate out the issues raised by these flocks, and by permitting the jury to consider the phantom flocks as if the evidence as to the condition of B-2 and C-2 uniformly applied to them. This error was prejudicial in itself. But the prejudice to defendant was immeasurably compounded by the fact that the jury was given an erroneous and thoroughly unjustified view of seven cumulative incidents.*

To reach his conclusion that defendant's feed was the cause of obesity in these hens—when neither he nor anyone else had even observed that they were obese—Dr. Hoffman testified that it was necessary for him to make the assumption that the phantom flocks were always plump as pullets going into the laying houses (A229-30). His reasoning was that if the pullets always were housed fat, there was a better chance that they would get fat while in the laying house (A200). The fact that the pullets from flocks A-1, A-2, B-1 and C-1 always arrived in the laying houses in plump condition was one of the four vital assumptions Dr. Hoffman made. This assumption was negated by the evidence.

Thirteen reports were written by Dr. Roger Murray (called first as plaintiff's witness) on the pullets in flocks A-1, A-2, B-1 and C-1. These reports were prepared long before any litigation was in prospect, and furnish a reliable, unbiased record as to whether or not the long-gone pullets had actually been plump going into the laying houses.

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* Whereas a proper view of the evidence limiting the Fatty Liver Syndrome diagnosis to B-2, C-2 and Dostie, would have been consistent with the testimony of the experts that this is simply an industry problem which everyone in the business encounters to some extent, irrespective of the feed (see testimony summarized in Defendant's Brief, pp. 33-34), the distorted picture of seven identical incidents tended to negate this testimony and inculpate defendant.

There is not a single reference to plumpness, obesity or excess weight in any of these reports. Plaintiff deceptively informs this Court that our point is "obviously a distortion," since one of Dr. Murray's reports does mention excess weight (Plaintiff's Brief, p. 30). In addition to the thirteen reports on pullets, Dr. Murray also reported on the phantom flocks as *hens* in seven more reports (E40-61). The single incident of excess weight in the hens (as defendant had pointed out in its brief at p. 11) corrected itself, for three weeks later, samples from this same group showed no excess weight. We made no distortion of the record.*

Of all the people who actually saw these four flocks, both as pullets and hens, the only opinion that they looked plump (as against many opinions, summarized in Defendant's Brief, p. 41, that they looked fine) was ventured by Mr. Leriche, the plaintiff himself. Since Mr. Leriche said that all chickens look alike to him anyway (A316), since he sees hundreds of thousands of chickens (A131), and since he is after all the plaintiff in pursuit of $162,820.12 on these birds alone, his opinion that pullets three and one-half years earlier seemed plump—in light of all the other contradictory evidence—does not and cannot support Dr. Hoffman's vital assumption. The court below committed reversible error in refusing to strike the hypothetical question on this ground alone. Dr. Hoffman said he required all four assumptions to support his conclusion (A206-08), so the fact that just one of his assumptions was negated by the evidence destroys the basis for his opinion.

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* While we would not detract from the issues raised on this appeal by responding point-by-point, distortions of the record are evident throughout plaintiff's brief. For example, in its brief at page 3, plaintiff says that in "1971 plaintiff observed that the birds were fat (Tr. 339)." This is not supported at Tr. 339 (A127); indeed, Mr. Leriche made no complaint about fat birds until August 1972 (A136a), after Dr. Hoffman's discovery of the problem in B-2 and C-2. The distortion of Mr. Gauthier's testimony (Plaintiff's Brief, p. 30) is blatent, as the record references demonstrate.

Furthermore, Dr. Hoffman's necessary assumption that the phantom flocks were grown on the same program as the flocks he saw (B-2 and C-2) is also unsupported, and for this additional reason the hypothetical question should have been stricken. The evidence would not even support the conclusion that the chickens had been raised entirely on defendant's feed, since it is undisputed that on at least six occasions there were interruptions in deliveries of defendant's feed to the complex, for periods up to two weeks (A359-60).

Plaintiff tortures the facts to get the phantom flocks onto the same feeding program as B-2 and C-2 (Plaintiff's Brief, p. 3). The fact is that B-2 and C-2 were plaintiff's only flocks to receive defendant's new Life Cycle feed from the time they were hatched. Plaintiff did not begin to use defendant's new Life Cycle feed in the complex until Fall 1971. Since this "new feed" was not even introduced onto the market by defendant until Spring 1971 (A326)—by which time all four phantom flocks had already reached maturity and were in the laying houses—it is inconceivable that the phantom flocks could have gone onto the new feed in the Summer of 1970, as Mr. Leriche erroneously testified (A121).

As to flock C-1—a flock accounting for $68,927.40 in damages—not even plaintiff could say what program 4,000 of these hens had been raised on, since they were replacement birds furnished by an unidentified breeder. There was no basis for an assumption that these birds, as pullets or even as hens, grew plump (if indeed they were plump) on defendant's feed.

Plaintiff's two responses on this point are simply too cavalier (Plaintiff's Brief, p. 31). First, plaintiff says the jury could have inferred that the new birds and existing birds in flock C-1 were "similarly debilitated" by defendant's feed program. Since the history and condition of these birds on arrival in plaintiff's complex is not known,

an inference by the jury that defendant's feed debilitated them would have been wild speculation. In any event, even this wild speculation still would not have supported Dr. Hoffman's assumption that these birds were grown on the same program as B-2 and C-2. There was nothing in the record to support such an assumption.

Plaintiff next argues that since the jury deducted $37,894.74 from the damages sought, maybe the difference indicated that the jury agreed with defendant as to C-1. It is beyond the province of the jury to correct the court's error by deducting amounts from the damage claim. If the hypothetical question was unsupported in any respect—as indeed it was—it was clearly improper and should have been stricken. There is no occasion for the jury to make adjustments for the deficiency on this issue. Moreover, since the reason for the adjustment is not known, it cannot be assumed that the jury took into account the failure of proof as to C-1.

Since there was no basis for liability as to the phantom flocks, the judgment should be reversed as to these flocks, and a new trial granted as to the remaining flocks.

II.

As to the remaining flocks there was no basis for liability.

A. The Dostie Flock.

Plaintiff claims it proved its case by the process of eliminating all of the problem areas in raising chickens, thus focusing on the feed. While this would not prove the existence of a defect in feed, as to the Dostie flock plaintiff did not even satisfy its own standard.

The Dostie flock was diseased, and its well-documented diseases were clearly unrelated to the feed. As defendant's brief summarized the testimony and exhibits (pp.

12-14), it was not until halfway through the damage period that this sick flock first showed any sign of obesity or Fatty Liver Syndrome. Moreover, the flock was by plaintiff's own admission molted twice during the damage period, a procedure which reduces but prolongs the rate of egg production. Since molting requires the removal of food or water, and since deliberately molting a flock at this point in its cycle would have been highly irregular, as plaintiff conceded (A17; A366-67), a serious question was thereby raised as to the management of this flock. Finally, plaintiff's supposed elimination of other causes did not even take into account the fact that nearly 6,000 hens of undetermined origin were added to the Dostie flock during the laying cycle, which would also necessarily have reduced production for a time. This fact is not even mentioned in plaintiff's brief.

Thus, plaintiff's own review of the evidence demonstrates the total inadequacy of its proof as to Dostie. First, plaintiff most definitely did not eliminate other problem areas, for it did not eliminate disease and it did not eliminate management problems. Second, defendant proved at least three other causes for reduced production in this flock: disease, molting and replacement birds.

Plaintiff grossly misstates the record as to Dostie. At several points through the brief, plaintiff says Dr. Gibbs testified that 60 percent of the Dostie flock had Fatty Liver Syndrome (see, *e.g.*, pp. 7 (twice), 18, 20). Dr. Gibbs testified that he had never seen the Dostie flock, but only examined samples brought to him, and therefore he could not testify as to any flock problem (A91). During a one-year period, Dr. Gibbs examined a total of 85 birds. While they had many other diseases, only 16 exhibited any sign of Fatty Liver Syndrome. Neither in the page reference cited by plaintiff for the 60 percent figure (A84), nor in the entire testimony of Dr. Gibbs, nor in the reports he prepared (E19-28) is there support for the statement that 60 percent

of the Dostie flock had Fatty Liver Syndrome.* On the contrary, Dr. Gibbs reports establish that during the first half of the damage period for which defendant was held liable, when the birds examined were rampant with other diseases, there was not a single reported incidence of Fatty Liver Syndrome. At no point did Dr. Gibbs express the view that the Dostie birds "overate on Purina's Chow and this caused FLS and obesity" (Plaintiff's Brief, p. 20).

Since the evidence was wholly inadequate to support plaintiff's contention, the judgment should be reversed as to Dostie, and a new trial granted as to the remaining flocks.

P. No Proof of Defect in the Feed.

Defendant has demonstrated, by substantial authority squarely on point, that plaintiff must prove a defect in the feed in order to recover, and that its failure to prove a defect should have resulted in a judgment for defendant as a matter of law (Defendant's Brief, pp. 25-32). *Denman* v. *Armour Pharmaceutical Co.*, 322 F. Supp. 1370 (N.D. Miss. 1970); *Ralston Purina Co.* v. *Edmunds*, 241 F.2d 164 (4th Cir. 1956), *cert. denied*, 353 U.S. 974 (1957); *Green* v. *Ralston Purina Company*, 376 S.W.2d 119 (Mo. 1964); and *Thomas* v. *Kasco Mills*, 218 F.2d 256 (4th Cir. 1955).

Plaintiff makes the curious statement in its brief (p. 15) that the force of this authority "dramatically pales" be-

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* At page 19 of its brief, plaintiff purports to make another percentage analysis, this time as to flocks B-2 and C-2. Plaintiff summarizes an examination by Dr. Bryant of eight birds, four fed on defendant's feed and four (homosote birds) on a competitor's feed (E16). Of the four homosote birds sampled, three seem to be out of production and the fourth showed excess body fat and a yellowish, brittle liver. This actually supports defendant's contention that Fatty Liver Syndrome is found to some extent in all flocks, whatever the feed.

cause it covers the whole spectrum from negligence to strict liability cases. Precisely the contrary is true. The universality of the proposition that plaintiff bears the burden of proving a defect, in negligence, warranty and even strict liability cases, gives all the more reason why it should not have been ignored by the court below.

Plaintiff's burden to prove a defect may be lessened when an extraordinary, bizarre, dramatic injury follows right on the heels of use or ingestion of defendant's product. But that is not the case at Bar. Plaintiff's injury—that its chickens during a period of two and one-half years did not lay as many eggs as some other people's chickens—is not an injury which establishes the feed as its likely cause. Plaintiff's alleged elimination of other possible causes, considering the nature of its injury, does not satisfy its burden of proof. If obesity or Fatty Liver Syndrome existed as a flock problem in flocks B-2, C-2 and Dostie, this condition was not sufficiently linked in cause or effect to defendant's feed.*

There was no proof of any defect in defendant's product, as plaintiff's brief amply demonstrates. All of the proof as to the composition of the feed negated any defect. The feed was manufactured according to formula and contained the protein levels represented (A442a), it had all the necessary amino acids (A331-32), and the energy levels were within all recommended ranges (A331-32).

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* Dr. Hoffman did *not* diagnose Fatty Liver Syndrome. Plaintiff's brief (p. 21) actually misquotes Dr. Hoffman; he said he was describing someone else's diagnosis, not his own. As defendant pointed out, no one has been able to reproduce the elusive Fatty Liver Syndrome experimentally, except by excessive force-feeding (Defendant's Brief, p. 33). Plaintiff claims defendant erred in failing to mention the force-feeding experiment (Plaintiff's Brief p. 20). Once again, however, the misstatement is plaintiff's, since both our brief and defendant's witness Dr. Snetsinger (A336) acknowledged the Michigan experiment.

(1) *Protein Levels and Amino Acids.*

Plaintiff at several points argues that the defect in defendant's feed was that the protein levels were deficient, citing authorities to the effect that (a) laying hens need 17, 18 or 19 percent protein, and (b) if protein falls below 14.5 percent, amino acids may become imbalanced. No defect in defendant's feed is proved by this evidence.

The expert nutritionists on both sides of this case agreed that protein levels—while once regarded as significant—are no longer viewed as the important factor in feed formulation (A211; A325-26). The level of protein in defendant's feed would therefore not indicate any defect. If the presence of 17 to 19 percent protein in feed would in and of itself be satisfactory, then what accounts for plaintiff's claim of reduced production in the Dostie flock? That flock at all times received feed with a minimum of 18 percent protein (A136a). Obviously, protein levels in feed are not determinative one way or the other on the issue of a defect.

The fact that amino acids might become imbalanced when protein levels drop below 14.5 percent also would not indicate that there actually was a defect in defendant's feed, since the exhibits and testimony establish that plaintiff purchased feed with a 15 percent protein level for the Vermont complex (A34; A322a) and 18 percent for Dostie (A136a). Plaintiff's emphasis on the fact that defendant's feed had only 14 percent protein is entirely misleading, since the feed which plaintiff purchased for its flock had a minimum level of 15 or 18 percent.

There was no proof of any amino acid imbalance in defendant's feed. Plaintiff points to testimony that an amino acid imbalance may result in loss of production and small egg size, two of plaintiff's chief complaints (Plaintiff's Brief, p. 5). The evidence established that the mere fact of hastening chickens into egg production at 20

weeks of age instead of 22 weeks (as plaintiff did) also may result in small eggs and low peak production (A333). Thus, these two consequences themselves surely do not prove an amino acid imbalance.

Dr. Snetsinger, who set up the nutrient specifications for defendant's feed, testified that the feed contained all amino acids necessary to do the job for which the feed was made (A331-32). Plaintiff did not cross-examine him as to this conclusion, and offered no contradictory proof.

The argument that plaintiff could not prove a defect because defendant refused to divulge its amino acid levels (Plaintiff's Brief, p. 23) is baseless. There was no examination by plaintiff which defendant blocked by a claim of trade secret. *After plaintiff had rested its case,* after Dr. Snetsinger had completed his testimony, and during defendant's examination of another of its own witnesses, defendant did advise the court that it regarded the amino acid levels in its feed as a trade secret, and it asked that additional testimony on this subject be taken *in camera.* The court below erroneously refused to give defendant the protection sought (A373), and defendant therefore did not pursue the subject further.

(2) *Energy Levels*

There was no proof of any defect in the energy levels of defendant's feed. The feed was within the energy ranges recommended by every one of plaintiff's authorities (A330).*

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* Throughout plaintiff's brief, there is special reference to brown birds and their tendency to overeat, since brown birds allegedly comprised a large portion of plaintiff's flocks (Plaintiff's Brief, pp. 5, 8, 21, 22). As is shown on plaintiff's charts and in plaintiff's testimony, only two of the seven flocks in issue—36,500 out of 200,000 birds—were brown birds (E2; E4). Apart from demonstrating the unreliability of plaintiff's references, the fact that

(footnote continued on following page)

Plaintiff argues that the recommendations made by defendant and others to cut down the energy level of the feed, in response to plaintiff's problem in August 1972, indicates a defect in the energy levels (Plaintiff's Brief, pp. 6, 20). The fact that the birds from B-2, C-2 and Dostie were put on a diet does not indicate any defect in defendant's feed. Defendant's witnesses were frank to admit that since they did not know the cause of the obesity or Fatty Liver Syndrome in these particular flocks, they were trying various approaches to deal with the condition. However, putting fat birds on a diet does not establish the feed as the cause of the obesity. Significantly, even when the protein levels were increased and the energy levels decreased, there was no improvement in the production rates of these hens. Even in flock C-2, which had just embarked upon its egg-laying cycle when the problem was discovered and the energy levels in the feed reduced, there was no improvement in production rates (E5). Finally, plaintiff's experience with the Dostie flock demonstrates that the defect could not have been in the energy level of defendant's feed. That flock received a higher protein-lower energy feed and still, according to plaintiff, had the same disappointing egg production rates.

Since plaintiff failed to sustain its burden of proof on this critical issue, the judgment should be reversed and judgment entered for defendant.

(footnote continued from preceding page)

there were different strains of birds with different eating tendencies actually supports defendant's argument. All flocks were swept together, as if a contagious disease had spread through a uniform group, for the jury's consideration.

Plaintiff again misstates the record when it claims to have used a brown bird chart to measure white bird production (Plaintiff's Brief, p. 9). Since brown birds produce eggs at lower rates than white birds, such a portrayal would have favored defendant. But, in truth, precisely the reverse happened. Production was shown on a white bird chart, to defendant's prejudice (E12).

III.

Evidence as to the absence of a single complaint by other purchasers of the same feed during the same period is probative and trustworthy.

This is a case where injury was proved solely by reference to printed charts of egg production rates forecast by other breeders and growers of chickens. Since plaintiff failed to achieve the results shown on the charts, it allegedly suffered injury. Plaintiff's damages also were determined by reference to these charts.

Proof that defendant's feed was the cause of this injury again came about not by direct affirmative evidence, but by building inferences from the disappointing egg production rates. Thus, as to injury, damages and defect, plaintiff did not present a case of facts about plaintiff and about the feed which could be confronted, challenged and thereby disproved; its case was entirely circumstantial, inferential and based on the actual experience of others.

Particularly on the state of this proof, it was error to exclude defendant's evidence as to the absence of complaints from other buyers of this fungible product. This evidence, which was relevant, probative and trustworthy, would have tended to negate the inferences constructed by plaintiff, and to support defendant's proof as to absence of a defect. The ruling of the court below foreclosing this avenue of proof was highly damaging to defendant.

Plaintiff misstates the record as to defendant's offer. Most significantly, plaintiff fails to mention that defendant proposed to establish the absence of complaints not only through its national complaint manager but also through its regional complaint manager. Defendant's counsel represented to the court below that this evidence would show that, on sales of more than one million tons of chicken feed

annually, defendant never in the last five years had received any complaints (other than plaintiff's) which required the witnesses getting involved in checking the feed formulas (A382). Since the essential element in defendant's feed program was its feed, there can be no doubt that the testimony would have encompassed plaintiff's complaint, whether it went to the feed or the program.

Plaintiff contends that this evidence is not probative because "no logical nexus" is demonstrable between the existence of a complaint and presentation of it to defendant's national complaint manager (Plaintiff's Brief, p. 11). This argument, of course, completely ignores the testimony defendant sought to introduce from its regional complaint manager. But perhaps the best demonstration of the nexus between the existence of a complaint and these witnesses is the fact that *this plaintiff's complaint reached them.* Obviously, plaintiff is misguided in its speculation that defendant is a bureaucracy (Plaintiff's Brief, p. 11) when it comes to processing complaints about its products.

The point that there were too many "variables" to make this evidence probative is also baseless. The nutrient specifications of defendant's feed and defendant's feed program (E33) were standard. Any variables in poultry management would be immaterial. Plaintiff insists that its management was superior; if defendant's other customers were poor managers, there would have been all the more reason for complaints. Thus, the so-called variables in feed program or management would not affect the probative value of this testimony.

Because this case concerns the design of a standardized product, and not a problem in one particular article (as in *Fortunato* v. *Ford Motor Co.*) or some individualized use of a defendant's product (*Frank R. Jelleff, Inc.* v. *Braden*), the evidence should have been allowed. Particularly in a case based upon circumstantial proof, similar evidence

has been received time and time again. See, *e.g.*, *Denman* v. *Armour Pharmaceutical, Co.*, 322 F. Supp. 1370 (N.D. Miss. 1970), and *Patton* v. *Ballam*, 115 Vt. 308, 58 A.2d 817 (1948). Proof as to other complaints would be circumstantial evidence tending to support or negate the inference of a defectively designed product.

Because such evidence as to defendant's business records is probative and trustworthy, it should have been received.* As is summarized in McCormick, *Evidence*:

> "A specialized and oft-recurring aspect of the conduct-as-hearsay problem is presented by the cases where a failure to speak or act is offered as the basis for an inference that conditions were such as would not evoke speech or action in a reasonable person.
>
> * * *
>
> "Taking these silence cases as whole, there had probably been a greater proportion of instances where the evidence is admitted, than in the case of affirmative conduct. The instances where the heasay problem is recognized or mentioned are even more infrequent than in the cases of positive conduct, and exclusion is often based on relevancy grounds. As in the other conduct-as-hearsay cases, the trend is in the direction of admitting the evidence as nonhearsay, which finds support in the recent statutes and rules." McCormick, *Evidence*, § 251, pp. 600-01.

Reversible error was committed in the exclusion of evidence as to the absence of complaints, which was both relevant and reliable. On this ground alone, the judgment should be reversed.

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* See Proposed Federal Rules of Evidence, 803(7), providing that the absence of an entry in business records would not be excluded as hearsay, but would be admissible to prove the nonoccurrence of the matter, if the matter was of a kind of which a report was regularly made.

IV.

The proof as to injury and damages was clearly improper.

In a case where plaintiff itself had long experience in the business, there was no basis for relying on the experience of others to establish that plaintiff had suffered any injury and to measure its damages. It was clearly improper for the jury to assess damages based on idealized production charts—even if these results may be achievable by others. Plaintiff was permitted to turn its back on its own long track record, save for one favorable example it selected, and recover damages for every egg short of someone else's performance goals.

The proof of damages through the charts was not only improper but also inherently unreliable as a measure of this plaintiff's loss. The charts assumed egg production beginning with a chicken of 22 weeks. Plaintiff's chickens were put into production at the age of 20 weeks. Thus, the charts were on their face simply inapplicable to plaintiff. As the evidence established, putting the chickens into production at 20 weeks itself would result in decreased egg production. Both plaintiff's witness Mr. Mercia (A311) and defendant's witness Dr. Snetsinger (A333) agreed on this point. The decreased rates from hastening egg production which both witnesses acknowledged obviously would exist throughout the egg-laying cycle and not just during the two-week period between 20 and 22 weeks.* As

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* If chickens were held out of production until they reached 22 weeks, obviously they would have no production until this time. Plaintiff says that what Mr. Mercia meant is that chickens put into production at 20 weeks would have a slight decrease in egg production until they reached 22 weeks (Plaintiff's Brief, p. 25). Decrease as against what? This strained construction ignores the obvious purport of Mr. Mercia's testimony, which referred to a decrease in production throughout the laying cycle as against hens started into production at 22 weeks.

Dr. Snetsinger stated, when chickens are put into production too early, "they will produce very small eggs and have low peak production" (A333). This obviously contemplates reduced production during the entire egg-laying cycle, and is completely consistent with Mr. Mercia's experience.

The charts were also unreliable to measure this plaintiff's production losses because of plaintiff's egg collection procedures. Plaintiff was awarded damages based on the difference in the eggs it actually counted and the goal performance ideals. Yet the evidence as to the number of eggs plaintiff received indicated substantial breakage and losses before they were counted, whether through the too-heavy accumulation of eggs in the machines (A319) or mechanical failures (A413). Plaintiff's breakdown of its damages, presented during trial (E37), stands as an example of the lack of reliability of its numbers.

Because the proof on this issue was improper and insufficient, a new trial should be granted as to damages.

Conclusion

Based upon the foregoing, it is respectfully submitted that the judgment for plaintiff should be vacated, in accordance with the relief requested in this brief and defendant's original brief.

December 9, 1974

Respectfully submitted,

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Court Press Form No. 2-Affidavit.
H.15

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

VERMONT FOOD INDUSTRIES, INC.,

Plaintiff-Appellee,

against

Ralston Purina Company,

Defendant-Appellant

State of New York,
County of New York,
City of New York—ss.:

IRVING LIGHTMAN being duly sworn, deposes and says that he is over the age of 18 years. That on the 30th day of December, 1974, he served two copies of the Reply Brief of Defendant-Appellant on Richard E. Davis Associates, Inc. the attorney for the Plaintiff-Appellee by depositing the same, properly enclosed in a securely sealed post-paid wrapper, in a Branch Post Office regularly maintained by the Government of the United States at 90 Church Street, Borough of Manhattan, City of New York, directed to said attorneys at No. P.O. Box 666, Barre, Vermont ~~(xxxxxxxxx, N.Y.~~, that being the address designated by them for that purpose upon the preceding papers in this action.

Irving Lightman

Sworn to before me this

30th day of December, 1974

Courtney J. Brown

COURTNEY J. BROWN
Notary Public, State of New York
No. 31-5472920
Qualified in New York County
Commission Expires March 30, 1976